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81-2216

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LAURA M. BYRD, PETITIONER

v.

SAN FRANCISCO UNIFIED SCHOOL DISTRICT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the District Court erred in rigidly applying the four prong McDonnell Douglas test to the plaintiff's case-in-chief and through this application overlooked some evidence and excluded other evidence of overt discriminatory treatment sufficient under other settled theories to establish a prima facie case of discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended.

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Civil Rights Act of 1964,
Title VII, Section 703(a)(1),
42 U.S.C. 2000e-2(a)(1) 2,3,12

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is an unpublished memorandum opinion noted at 673 F.2d 1336 and is printed in Appendix A.

The opinion of the District Court is not reported but is printed in Appendix B. The judgment of the District Court is printed in Appendix C.

JURISDICTION

The judgment of the court of appeals (App. A, infra) was entered on March 3, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), provides in pertinent part:

> It shall be an unlawful employment practice for an employer--
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin....

STATEMENT

Plaintiff-petitioner Laura M. Byrd, a black tenured teacher with the Defendant-respondent San Francisco Unified School District since 1971, brought this Title VII employment discrimination action in the United States District Court for the Northern District of California on June 28, 1979.[1/] Among other things, the plaintiff alleged that the School District had discriminated against her on the basis of race, in violation of Section 703(a)(1) of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-2(a)(1), by denying her

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1/ Petitioner had previously filed a complaint with the Equal Employment Opportunity Commission on October 10, 1975, and with the Fair Employment Practice Commission on October 8, 1975. On April 6, 1979, Plaintiff received her right to sue letter from the Civil Rights Division of the United States Department of Justice.

request to rescind a leave of absence without pay which she had been granted. Plaintiff sought relief in the form of back pay, costs and attorneys' fees. The case was tried to the court on June 30, and July 1-2, 1980, and on July 2, 1980, the court read its findings of fact and conclusions of law into the record, holding that the plaintiff had failed to establish a prima facie case of racial discrimination. App. B, infra, at 28a. Moreover, the court also stated that even if the plaintiff had demonstrated a prima facie case, the defendant provided a legitimate nondiscriminatory reason for its action, which the plaintiff had not shown to be pretext. Id.

In May 1975, the plaintiff, as a tenured teacher, applied to the defendant for a one year unpaid leave of absence in order to pursue graduate work in African Studies at Howard University.

Plaintiff's application was submitted through regular channels. Before official action on her request by the Board of Education, the plaintiff's principal, fully cognizant of the plaintiff's equivocation on her decision to take a leave of absence, wrote to the defendant's Personnel Division and explained that he would "write her name out of the program." Trial Exhibit #30 (emphasis in original). He further wrote at that time:

> If she changed her mind between now and August, as she indicated she might, there would not be a program for her at George Washington High School at that time.

Id. The Personnel Division immediately responded:

> If she were to apply to abridge her leave for this fall, the District would exercise its right not to grant the abridgement.

Id. These adverse employment decisions were made without notice to the plaintiff, before leave was initially granted, and without submitting the matter to the Board of Education, the only body empowered to make such official decisions. The Board of Education subsequently granted her leave request.

When plaintiff applied for rescission of her now-granted leave, the Personnel Division denied her request, stating that no vacancy presently existed. The basis for this contention rested upon a staffing strategy, designed in response to declining enrollment, which permitted excess personnel to enter and be drawn out of a consolidation pool in accordance with the ebb and flow of the student population, a strategy which rendered defendant's staffing needs somewhat uncertain until several weeks

into the school year.

In support of her contention that this adverse employment decision denying her request to rescind her leave was racially premised, the plaintiff sought to introduce evidence of racially discriminatory treatment of herself and other blacks by her principal through his adverse acts and attitudes. In addition, plaintiff attempted to introduce evidence of similar, though not identical, actions taken against another black teacher, but the District Court excluded such testimony as irrelevant.

On July 2, 1980, the court issued its findings of fact and conclusions of law. App. B, infra. Upon analysis of the evidence, the court ruled that the plaintiff had failed to make out a prima facie case under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), since she

failed to show that there was a position available for which the defendant sought applicants of qualifications similar to those of the plaintiff. The court also noted that the plaintiff had sought to demonstrate that she was prevented from rescinding her leave because of her principal's racial animosity. The court, however, concluded that there was no evidence of any racial attitude on the part of the principal and further that the plaintiff had "failed, utterly, to show that [her principal] has anything to do with the decision by the District in August not to rescind the leave." App. B, infra, at 23a. The court also noted, almost in passing, that even if the plaintiff had established a prima facie case, the defendant had come forth with a legitimate nondiscriminatory reason for refusing to rescind her leave,

which the plaintiff had not shown to be pretext. Id. at 23-24a.

The plaintiff appealed the District Court's decision pro se to the U.S. Court of Appeals for the Ninth Circuit. On appeal, the plaintiff raised three principal issues on the Title VII claim: (1) that the District Court mechanically, and improperly, applied the four prong McDonnell Douglas test to the plaintiff's prima facie case; (2) that the District Court erroneously barred evidence of her principal's racial animosity; and (3) that the District Court's conclusion that her principal had nothing to do with the defendant's decision not to rescind her leave was clearly erroneous. On March 3, 1982, the Ninth Circuit affirmed the District Court's decision, concluding that the District Court properly applied the McDonnell Douglas test and that

the plaintiff had failed to establish a prima facie case within that framework. App. A, infra. The Ninth Circuit further stated that the defendant had articulated a legitimate, nondiscriminatory reason for its action which the plaintiff had failed to rebut. Id. at 2a. The Ninth Circuit also concluded that the District Court judgment was not clearly erroneous. Id.

REASONS FOR GRANTING THE PETITION

Although this Court first provided guidance as to the order and allocation of proof in individual Title VII suits in McDonnell Douglas in 1973, the courts below have continued to struggle with the application of these guidelines in varying factual situations. In McDonnell Douglas, this Court stated:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial

> discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802 (emphasis added). Nonetheless, however helpful this framework for analysis might be in particular factual settings, it "was never intended to be rigid, mechanized, or ritualistic." Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). Rather, this Court later explained:

> The importance of McDonnell Douglas lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering

> evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.

Teamsters v. United States, 431 U.S. 324, 358 (1977).

Despite the helpful framework which the McDonnell Douglas test can provide in the appropriate factual circumstances, "[t]he central focus of the inquiry in a case such as this is always whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'" Furnco Construction Corp., supra, 438 U.S. at 577. The language of the statute simply makes it unlawful for any employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C.

2000e-2(a)(1). Thus, to make out a prima facie case, the minority plaintiff must merely demonstrate that she suffered from an adverse employment decision "under circumstances which give rise to an inference of unlawful discrimination." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (footnote omitted). If the plaintiff's evidence is sufficient to accomplish this end, application of a formalistic test, such as the McDonnell Douglas framework, is unnecessary.

Contrary to the teachings of this Court in Teamsters, Furnco and Burdine, the District Court from the opening words of the instant case mechanically, and erroneously, sought to squeeze the plaintiff's case-in-chief into the McDonnell Douglas framework. In the process, the court overlooked, and indeed, excluded obvious evidence of

racial discrimination sufficient to demonstrate that the denial of the plaintiff's request for rescission of her leave of absence occurred "under circumstances which give rise to an inference of unlawful discrimination." The plaintiff herself attested to her principal's prior attempt to remove her from the school, his hostility toward a black history week program and his repeated arguments with black teachers in contrast with his friendly attitude toward white teachers. Thus, the plaintiff supplied precisely the type of testimony which can demonstrate the unlawful nature of the defendant's employment practice. See Lynn v. Regents, Univ. of Calif., 656 F.2d 1337, 1343 (9th Cir. 1981) ("The existence of a discriminatory attitude, like general statistical data, tends to establish that it is more likely than not that the [defendant's] decision was

based on an impermissable criterion, and therefore tends to establish [plaintiff's] prima facie case.") Neither the District Court nor the Ninth Circuit made any mention of this evidence in their decisions.

Moreover, the District Court improperly barred the testimony of another black teacher in the same school who encountered racial difficulties in circumstances not unlike those in which the plaintiff found herself. This witness sought to describe his experience with the school principal upon the witness' return from a sabbatical leave. He was told by the principal that there was no position for him and that he would have to go to another school. Two "ghetto" schools were suggested as possibilities. The District Court excluded this testimony, stating that "it makes no difference what happened to other

people. You can't bring in experiences of other people to show...any one of the four steps that you have to take to make even a prima facie case." (Trial Tr. 176.) Therefore, the District Court's rigid application of the four prong McDonnell Douglas test resulted in exclusion of evidence which tended to show circumstances of discrimination merely because it did not fit the McDonnell Douglas mold. Cf. Scofield v. Bolts & Bolts Retail Stores, 21 FEP Cases 1478 (S.D.N.Y. 1979) (plaintiff supported prima facie case of discriminatory discharge on account of age by evidence of discharge of another similarly situated employee of same age).

Despite the exclusion of this clearly relevant evidence, the District Court in its findings of fact concluded that the plaintiff provided no evidence of the principal's role in the decision

not to permit the rescission of the plaintiff's leave of absence. However, this finding is clearly erroneous. Upon learning of the plaintiff's request for a leave of absence and her uncertainty as to whether she would be financially able to take the leave, the principal wrote to the defendant's Personnel Division and requested that she not be allowed to return to the school. Trial Exhibit #30. The Personnel Division immediately responded that she would not be permitted to abridge her leave. Id. This documentary evidence, prepared by the defendant's agents at the time these events occurred, plainly shows not only that the principal had a hand in the decision but that the Personnel Division assured him that his request that she not be allowed to return would be honored. Therefore, the District Court's disregard for evidence of the principal's discrimi-

natory animus improperly hindered the plaintiff in making out her prima facie case.

Moreover, this very same evidence of discrimination, excluded and overlooked by the District Court, also would address the issue of pretext. Thus, the District Court's erroneous interpretation of McDonnell Douglas not only precluded proper evaluation of the plaintiff's prima facie case but also the plaintiff's rebuttal case as well.

Had the District Court properly admitted and considered the evidence of discrimination, the defendant's adverse employment decision would have been shown in its proper context, giving rise to an inference of discrimination. Nothing more is required by Burdine to establish a prima facie case. The District Court's ritualistic application of the McDonnell Douglas formula produced

a decision inconsistent with Burdine.

In view of the recurring nature of the misapplication of McDonnell Douglas, see e.g., U.S. Postal Service v. Louis H. Aikens, No. 81-1044, petition for writ of certiorari granted, 455 U.S. ___ (1982), the petitioner herein respectfully requests that this petition for writ of certiorari be granted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Bruce A. Fredrickson

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT

LAURA M. BYRD,
Plaintiff-Appellant,

v.

SAN FRANCISCO UNIFIED SCHOOL DISTRICT
Defendant-Appellee.

No. 80-4410
D.C. No. 79-1539 WHO
Filed: March 3, 1982
MEMORANDUM

Appeal from the United States District Court for the Northern District of California

Honorable William H. Orrick,
United States District Judge, Presiding

Argued and Submitted: February 8, 1982

Before: WALLACE and KENNEDY, Circuit Judges, and CROCKER,* District Judge.

This case is before this Court after judgment against Appellant who accused the Appellee San Francisco Unified School District of depriving her of employment as a teacher in violation of Title VII of the 1964 Civil Rights Act and in breach

of her contract as a teacher. She is a black woman.

The record on appeal supports the conclusion that the District Court judgment was neither clearly erroneous nor contrary to law.

The District Court was correct in following the law as stated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and in finding that as of the time Appellant requested a revocation of her leave of absence no openings were available in the school district. Thus, the Appellant failed to establish a prima facie case. In addition, the school district articulated a legitimate, non-discriminatory reason for its failure to rescind Appellant's leave, a reason which Appellant failed to establish was a mere "pretext" for unlawful discrimination. See Texas Dep't of Comm. Affairs v. Burdine, 101 S. Ct. 1089, 1095 (1981).

A granting of the revocation would have "cost" the school district the salary of an additional teacher when the district was in a situation where it already had a surplus of salaried teachers.

Further, Appellant's breach of contract claim is without merit.

AFFIRMED.

*Honorable M.D. Crocker, Senior United States District Judge for the Eastern District of California, sitting by designation.

Appendix B

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

LAURA M. BYRD,
Plaintiff

v.

SAN FRANCISCO UNIFIED SCHOOL DISTRICT,
Defendant

Civil No. C-79-1539-WHO
Rendered: July 2, 1980

Before: The Honorable William H. Orrick, Judge

OPINION OF THE COURT

The case came before the Court for trial on Monday Afternoon, June 30th; and was tried on the afternoons of June 30th, and July 1st.

And the Plaintiff appeared through Mr. Rufus L. Cole, Esquire; and the Defendant School District appeared through Mr. Philip Ward, the Deputy City Attorney.

The trial lasted three days, terminating on July 2nd, 1980.

The Court considered all the exhibits entered -- admitted, all those specifically excluded in the course of the trial; and considered the briefs, the exhibits, and special memoranda filed by the parties, as well as the oral testimony provided by the Plaintiff, Mr. Cathey, Mr. Abad, Mr. Seymour, Mr. Madfes, and Dr. Kennedy.

And having heard all of that testimony, and having considered all that evidence, the Court adopts the following findings of fact and conclusions of law, in accordance with Federal Rule of Civil Procedure No. 52.

First, with respect to findings of fact.

1. The Plaintiff is a black female, who received a Bachelor of Arts Degree from the University of California at Berkeley in 1967, and a Secondary

Standard Life Teaching Credential from the University of San Francisco in 1968. She commenced employment with the San Francisco school district in February of 1969.

And at all times relevant here she was considered to be a certified, tenured teacher.

And there was, throughout the trial, no question with respect to her competence as a teacher. That wasn't an issue, nor was it questioned.

And she performed entirely satisfactorily during all her time at George Washington High School.

The Defendant San Francisco Unified School District is a local public entity, created by virtue of state law.

The Board of Education of the San Francisco Unified School District is charged with the responsibility of

operating and maintaining the public schools, both elementary and secondary, in the city and county of San Francisco.

2. The Defendant is the employer of in excess of 15 persons, in an industry affecting commerce; and it's authorized by law to, and then does, employ school teachers.

3. One of the secondary schools operated by the Defendant is George Washington High School.

4. Near the end of each academic year in the secondary school system the principal of a school is responsible for formulating plans for the coming year. And in that connection he must consider teacher allocation, teacher assignments, curriculum, management, surveys of students' desires and needs; and must also coordinate with the procedures and policies of the Board of Education.

5. The Principal is specifically charged with the responsibility of managing teacher allocation. And Mr. Saul Madfes was the principal of George Washington in May through August of '75.

6. From and after 1971 the Defendant experienced a steady reduction in student enrollment, and a consequent decline in funds coming from state subsidies. And this produced an excess number of teachers each year for which there did not exist regular teaching positions.

7. One of the principal reasons for making plans near the end of one academic year for the next was to prepare the overage, or the consolidation, list for the particular school. And this list contained the names of teachers who are surplus for the coming year because of funds cutbacks, program

curtailments, and/or declining student enrollment.

The consolidated teachers would receive full salary during the coming year, but would not have a specific classroom assignment. They would be used as substitutes as need be by the district. And if a permanent teaching position became available, the district would look to the pool of consolidated teachers.

If a teacher with the necessary skills was in the consolidated pool, he or she would be offered the teaching position. And it was only if a teacher with the necessary skills was not found in the consolidated pool that the district would consider other individuals for the vacant teaching position.

8. In late April and in early May of each year the principal fore-

casts the number of students expected in school for the following September. The Principal has the students surveyed to determine their desires for elective courses, and he also surveys the teachers of the school to determine whether they plan to teach; and, if so, what courses they wish to teach.

9. Taking into account all of the foregoing, plus board of education policies in maximum class size, the Principal then formulates a master class schedule for the coming year.

10. At this time the Principal also ascertains if he has enough, or too many, teachers for the schedule. If there are too many teachers at the school, he then prepares an overage or consolidation list. And teachers then declared surplus are notified in early June that their services will not be

needed in September.

11. An unexpected retirement, resignation, or other unavailability of a teacher affects the proposed schedule of classes, as well as the need for, and composition of, an overage list.

12. In the event there are unexpected occurrences affecting the master schedule, the Principal will meet in mid-June with his administrative staff to rearrange classes of teachers as is necessary. These tasks must be done at the time before vacations occur, in order for teachers to prepare their classes, and to know their plans for the next school year.

13. The Defendant has in effect for all times material hereto, procedures and policies permitting teachers to take various kinds of leaves of absence. And one type of leave is for

study and travel for which permanent teachers may apply.

14. In early May, 1975, the Plaintiff prepared as so-called wish sheet, showing her intents and desires regarding the coming school year. She indicated her preference for class periods, and courses. And those preferences were then taken into account by the Principal, Mr. Madfes, in constructing the master schedule.

15. I should add, here, that Mr. Madfes was retired on August 29th, 1975, from the school district.

16. In the middle of May of 1975 the Plaintiff received her assignments for the coming year.

17. On May 29, 1975, the Plaintiff applied to the Defendant for an unpaid study and travel leave of absence by filling out the appropriate forms. The

leave was for one year, from July 1, 1975, until July 30, 1976; and was duly granted by the Board of Education after the forms were submitted to the district office.

Mr. Madfes was not informed by the Plaintiff that she had applied for a leave of absence. He didn't know that.

And I note, parenthetically, that the Plaintiff pointed out, and I think the others agreed, that that was not a requirement.

On the other hand, the professionals pointed it out as a professional courtesy, and just...logically the Principal should have known it.

And it seems to me that in consideration for someone else the Plaintiff should have notified the Principal at that time, even if limited to professional courtesy. Let alone on common decency.

18. On June 10, 1975, the leave was approved by the staff, and the leave

form prepared. And it was then that a copy was sent to Mr. Madfes.

19. In the interim, Mr. Madfes had not only completed the master schedule for the following year, but had also prepared and distributed the overage and consolidation list.

20. Seven teachers were told they would not be returning to George Washington High School.

21. The first time that Mr. Madfes learned that the Plaintiff was taking leave was June 13, 1975, which was the last day of school.

22. Early in the next week Mr. Madfes met with his staff and adjusted the master schedule to take into account the Plaintiff's absence. Teachers were reassigned, schedules were changed, and Mr. Madfes took one teacher off the consolidation list and included that teacher in his schedule

for George Washington High School for the '75-76 school year. That person was identified as...Sandra Shore, who had less seniority than the Plaintiff.

23. On June 24, 1975, the Board of Education finally approved Plaintiff's request for study and travel leave.

24. On August 4, 1975, the Defendant wrote -- the Plaintiff wrote the Defendant that she wanted to rescind her leave and return to teaching in September.

25. At the time of this....of Plaintiff's request for rescission, the Defendant's Assistant Superintendent for Personnel Services was Dr. Frederick A. Kennedy, himself a black man; and the Defendant's Personnel Services Supervisor was Jack Abad, a white man.

26. On August 6, 1975, Defendant, through Mr. Abad, wrote the Plaintiff that her request was refused, because there were no positions available in the District for her.

Mr. Madfes did not have the authority, nor was he involved in any way, in the decision of the District not to grant the Plaintiff's request to rescind her leave of absence. And this, of course, is primarily because he retired.

27. On August 6, 1975, and thereafter, there were insufficient funds to the Defendant to hire all of the available teachers who, at one time or another, were employed by the Defendant. There were also insufficient students to justify hiring all the teachers who were eligible for employment with the Defendant.

28. During the period that the Plaintiff was in contact with either or

both Mr. Kennedy and Mr. Abad, there were no teachers' positions available in the District to which Plaintiff, with her qualifications, could be appointed.

And I should here point out that Mr. Madfes, after he received notice that the Plaintiff was going on leave "wrote her out" of the program; in that he rejuggled his schedule to accommodate the students' needs and requests, with the number of teachers that he had, and their respective skills.

Dr. Kennedy had told the Plaintiff that he would try to find the Plaintiff a position somewhere in the School District. The Plaintiff gave Dr. Kennedy the impression that she only wanted to return to her former position at George Washington High School, and that she would refuse any other assignment.

And I should here note that Dr. Kennedy was the only unbiased

witness that we had in the case; that his testimony on that subject was contrary to the Plaintiff's; and that the Court believes Dr. Kennedy.

And, similarly, the Plaintiff said she got an opinion from Mr. Cannon. And Mr. Cannon said he didn't even know the Plaintiff, and never gave such an opinion -- and wouldn't have -- because it wasn't the law.

29. Thereafter the Plaintiff remained on leave through June 30, 1976. During most, if not all, of 1976 she had relocated to Washington, D.C., and was not available to the Defendant as...no teacher's position had become available.

30. Eventually the Plaintiff returned from leave, and returned to a teaching position with the School District. And she now occupies that position.

Her Title VII Suit is brought for

the purpose of obtaining back pay for the one year when she was absent -- well, when she wasn't taken back. She was in the city. And, as I indicated before, she said she was willing to take another position; and Dr. Kennedy said that she had told him, to the contrary, that she either wanted to go back to George Washington, or she wouldn't be employed at all, and that she would refuse any other assignment.

Using his words, he said: she was "dissatisfied."

31. Dr. Kennedy stated, unequivocally, that there was no position for the Plaintiff; that there was no lack of due process; and that Madfes was not involved in any way, whatsoever, in connection with the rescission of the leave.

32. The employment relationship between the Defendant and its teachers is defined by the applicable statute by

the state of California, the provisions of the charter of the city and county of San Francisco, and the various rules, procedures, and policies of the Board of Education.

And Dr. Kennedy pointed out that the Board adopted policies, and the administrative staff adopted and acted by rules and regulations.

33. There are no provisions of law, and there is no statute, and there is no rule, regulation, or policy, dealing with the subject of rescinding a study and travel leave. There are provisions devoted to sabbatical leave, but none referring to this study and travel leave without pay.

34. The Defendant handles rescission requests, similar to that of the Plaintiff, on a case-by-case basis. Considerations applicable to rescission requests include available funds, vacant

positions, program needs, and the qualifications of the teacher.

35. The Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission on October 10, 1975; and a similar charge with the California Fair Employment Practice Commission on October 8, 1975.

36. The Plaintiff was issued a Right to Sue Letter from the United States Department of Justice on April 6, 1979; and filed this action June 28, 1979.

Conclusions of Law.

1. Jurisdiction over this case is found pursuant to Title VII of the 1964 Civil Rights Act, as amended by the Equal Opportunities Act of 1972, 42 United States Code, Sections 2000e, et seq.

2. Jurisdiction over the third cause of action of the Complaint is

found under the pendent jurisdiction of the Court, which the Court here exercised.

3. The burden is on the Plaintiff to prove discrimination. Unless she has met that burden with a prima facie showing, the burden does not shift to the district to show nondiscrimination. Naraine against Western Electric, 507 F.2d 590.

4. In order to show pretext, the Plaintiff must show that race was a "but for" cause of the refusal to rescind her leave of absence. That's the rule the Supreme Court adopted in McDonald against Santa Fe Trail Transportation Company, 427 United States 273. And, specifically, it's in footnote 10, on page 282.

In this case the focus of Plaintiff's proof has been on the alleged racial animosity of Mr. Madfes. But the

Plaintiff has failed, utterly, to show that Mr. Madfes had anything to do with the decision by the district in August not to rescind the leave. And, thus, has failed to show that Mr. Madfes' alleged racial animosity was a "but for" cause as required by McDonald against the Santa Fe.

And, similarly, the failure of the Plaintiff to establish a causal link between Madfes' alleged racial attitude--of which there was no evidence -- and the district's refusal to rescind, renders the evidence offered by Plaintiff as to Madfes' other acts of alleged racial discrimination as totally irrelevant.

And I note in passing that, including irrelevancy, Mr. Madfes belonged to a number of organizations of which blacks were members, and which served the cause of blacks.

5. In order to establish a breach of contract, the Plaintiff must show the existence of a contract, which is defined as an agreement which gives rise to an obligation, or a legal duty enforceable in an action at law.

And that's Hornbook Law in Corbin on Contracts.

In this case the Plaintiff failed to demonstrate any terms of an employment contract dealing with rescission of leave of absence.

6. The unjustified failure to perform a material term of contract is a breach. Again, Hornbook Law. Sterling against Gregory, 149 Cal. 117.

Here the Plaintiff has failed to show any departure from what she alleges to be a term of her contract; that is, adherence to normal school district policy on rescission of leaves of absence. And, thus, even if the terms

of the contract had been adequately established -- which they were not -- no breach of contract has been shown.

7. Most seriously, there has been no disparate treatment shown at all, in accordance with the pattern laid down in McDonnell Douglas Corporation against Green, cited in 411 United States.

This is the touchstone of Title VII law. And the Supreme Court lays it out very clearly. Justice Powell says: the Complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing: (1) that he belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that despite his qualifications he was rejected; and (4) that after his rejection the position remained open and the

employer continued to seek applicants from persons of complainant's qualifications.

And in Footnote 13 the Court says: the facts necessarily will vary in Title VII cases. And the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.

And so in the present case the Plaintiff, in order to make a prima facie Title VII case, would have had to show: (1) that she belongs to a racial minority -- and she showed that -- (2) that she was qualified for an available teaching position in the San Francisco Unified School District if one was available -- and she showed that -- (3) that no one in the pool of consolidated teachers was qualified to fill the available teaching position -- she didn't show that

-- (4) that the district, rather than offer the available position to the Plaintiff, sought applicants from persons possessing the Plaintiff's qualifications. She didn't show that.

And, most important of all, she didn't show that there was a position at the time she applied in the San Francisco Unified School District.

And, in point of fact, the testimony was clear the district wasn't hiring any new people at that time, but in -- as one witness said: consolidation was the name of the game. And they were encouraging leaves, and sabbaticals, because they had a substantial excess of teachers, all of whom were in the so-called substitute pool.

The Plaintiff...has not shown that the consolidated teacher pool did not contain a teacher who was qualified to teach the same subjects as the Plaintiff.

And, further than that, there's no evidence that the district actively sought to hire teachers of the same subject matter as those of the Plaintiff. And, rather, there's overwhelming testimony that the district did no hiring, whatsoever, in the 1975 school year.

And as a conclusion of law I find that the Plaintiff did not establish a prima facie case of racial discrimination.

And, finally, even if the prima facie case had been proved, the legitimate -- the district came forth with a perfectly legitimate nondiscriminatory reason for refusing to rescind.

And Plaintiff has not shown that that reason was, or even could have been, a mere pretext for racial discrimination, as the Court had in mind in McDonnell Douglas.

Now, with respect to.... I think that about covers it. And the defendant

-- the Plaintiff takes nothing by her complaint; and the Defendant will submit a form of judgment.

Appendix C

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

LAURA M. BYRD,
Plaintiff,

v.

SAN FRANCISCO UNIFIED SCHOOL DISTRICT,
Defendant.

No. C-79-1539 WHO
JUDGMENT
July 8, 1980

This matter came on regularly for trial on June 30, July 1 and July 2, 1980 before the Honorable William H. Orrick, United States District Judge, sitting without a jury, Rufus L. Cole, Esq., appearing for plaintiff, and George Agnost, City Attorney, by Philip S. Ward, Deputy City Attorney, appearing for defendant.

The Court having adopted Findings of Fact and Conclusions of Law in accordance with Rule 52 of the Federal Rules of Civil Procedure, and good cause appearing therefor:

IT IS HEREBY ADJUDGED AND DECREED that plaintiff Laura Byrd take nothing by way of her Complaint, and defendant San Francisco Unified School District have judgment in its favor, together with its costs incurred herein.

DATED: July 8, 1980

WILLIAM H. ORRICK /s/
UNITED STATES DISTRICT JUDGE

Approved as to form:

RUFUS L. COLE, Esq. /s/
ATTORNEY FOR PLAINTIFF

Office - Supreme Court, U.S.
FILED
JUL 7 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2216

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LAURA M. BYRD,
Petitioner,

vs.

SAN FRANCISCO UNIFIED
SCHOOL DISTRICT,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT OF THE CASE

Beginning in 1971 and continuing through at least 1976, the San Francisco Unified School District (herein "the District") experienced a steadily declining student population and consequent reduction in funding from the State of California. This resulted in a surplus of teachers, many of whom had gained tenure during the "baby boom" that followed the end of World War II. This surplus was getting larger each year. Appendix B to Petition for a Writ of Certiorari herein, at 8a.

Initially the District attempted to avoid laying teachers off by adopting alternate strategies designed to reduce the surplus. The District encouraged leaves and sabbaticals and also instituted a "consolidation" program. When a school within the District had too many teachers for the number of students enrolled, the teachers with less seniority at that school were placed on a consolidation list. This had the effect of removing them from permanent assignment to the school. While they remained on full salary for the school year, they were assigned as needed throughout the city to substitute for teachers with regular assignments. *Id.*, at 8a-9a.

Since consolidation was disruptive to the teachers, and because consolidated teachers remained on full salary working or not, the District followed a policy of going first to the pool of consolidated teachers to fill personnel needs. *Id.*, at 9a. It was hoped that the District could thus avoid additional salary expenses for newly hired teachers as well as the costs incurred if a teacher on unpaid leave had to be reemployed to fill a vacancy. *Id.*, at 8a-9a; 27a-28a.

The plaintiff was a regularly employed and tenured teacher with the District in May of 1975 assigned to George Washington High School. The principal of her school, Mr. Saul Madfes, was at that time in the middle of his planning for the next academic year beginning in September. He was attempting to forecast the expected student enrollment, survey the curriculum desires of both students and faculty and construct a class schedule before the last day of school. *Id.*, at 9a-10a. At the end of this process he also had to identify and notify those teachers who would be surplus at the high school in September and would therefore be consolidated. *Id.*, at 8a-9a; 10a-11a.

At no time during this planning period did the plaintiff inform Mr. Madfes that she had decided to seek and had in fact applied for an unpaid study and travel leave for one year from July 1, 1975 through June 30, 1976. Even though she would not be available for the upcoming year, the plaintiff nevertheless filled out a proposed teaching schedule and submitted it to Mr. Madfes. He relied upon it and included plaintiff in the fall class schedule. *Id.*, at 12a-13a.

Given the financial squeeze in which the District found itself in 1975, it readily granted plaintiff's request for an unpaid year of leave. *Id.*, at 13a-15a. But due to plaintiff's intentional refusal to inform her principal of her plans, Mr. Madfes first learned of the leave request on June 13, 1975, the last day of school. *Id.*, at 14a. He had already composed his master schedule and informed seven teachers that they were to be consolidated. *Id.*

The next Monday Mr. Madfes immediately met with his administrators, reconstructed the fall schedule to account for plaintiff's absence and notified one of the consolidated teachers that she would not be forced to leave George Washington High School. He did this to preserve morale and set the schedule before summer vacation in order for teachers to plan their classes. *Id.*, at 14a-15a; 17a.

Then on August 4, 1975 the plaintiff wrote to the personnel officer of the District and said that she had reconsidered and wanted to rescind her leave. The recission request was handled by Dr. Frederick A. Kennedy, a black administrator. *Id.*, at 15a. Over the next several months Dr. Kennedy repeatedly informed plaintiff that the District did not have a vacancy for her, especially since plaintiff insisted that she not only wanted to return but that she wanted to return only to George Washington High School. *Id.*, at 16a-18a. The District had more than enough consolidated teachers already on salary to fill unexpected vacancies, and it chose not to rescind an unpaid leave and incur even more salary costs for the coming year.

The testimony of the District's witnesses established that no written rules governed rescission of study and travel leaves. Each such request was handled on a case-by-case basis. The District considered available funds, vacant positions, its program needs and other criteria. *Id.*, at 19a-21a. On the basis of these considerations the District declined to rescind the plaintiff's leave. She remained on leave in Washington, D.C. for most of 1976. Eventually she returned to her position as a teacher with the District, a position which she still occupies. *Id.*, at 18a.

The District Court concluded that the plaintiff had failed to produce any evidence that she was denied the leave rescission because of her race. *Id.*, at 25a. She failed to establish a *prima facie* case of discrimination under law. Moreover, the trial court concluded that even if a *prima facie* case of discrimination had been established, the District had convincingly refuted it by producing evidence of a "perfectly legitimate nondiscriminatory reason for refusing to rescind" that was not pretexual. *Id.*, at 28a. These findings and conclusions were affirmed without dissent by a panel of the Court of Appeals for the Ninth Circuit. Appendix A.

REASONS WHY CERTIORARI SHOULD BE DENIED

Nowhere in her Petition does the plaintiff discuss the provisions of Rule 17.1 of the Rules of the Supreme Court. A reading of that rule compels the conclusion that subsections (a) and (b) have no application herein. The plaintiff does not contend that the Court of Appeals decision below conflicts with decisions in the other circuits. Nor does this case involve a decision by a state court.

The only remaining basis for review in this Court, Rule 17.1(c), is also inapplicable herein. Throughout her Petition the plaintiff implies that the Court of Appeals has deviated from "applicable decisions of this Court," principally the holding in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). However the only issues raised by the plaintiff's arguments relate to questions of evidence and factual findings. Plaintiff does not contend that the courts below failed to apply the legal standard appropriate to a Title VII disparate treatment case. Rather she quarrels with the results they reached in applying that standard to the evidence.

It is a settled principle that a writ of certiorari is not issued in order to review evidence or second-guess the courts most familiar with the factual record. *National Labor Relations Board* v. *Waterman S.S. Corp.*, 309 U.S. 206, 208 (1940); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). This rule has added force when the plaintiff's dispute is with the trial court's resolution of issues of conflicting evidence and credibility of witnesses, which findings were not found to be clearly

erroneous by the Court of Appeals. *Graver Tank & Manufacturing Co., Inc.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

The plaintiff's two points of error are purely evidentiary and factual. The trial court is accused of overlooking or improperly excluding evidence proferred by plaintiff to show that her principal had acted in a biased fashion against blacks prior to May of 1975. Petition, at 14-16. She also contends that the District Court erred in concluding that Mr. Madfes had nothing to do with the denial of her request for rescission. *Id.*, at 16-18. Neither of these factual points warrants review by certiorari.

In any event, these factual issues were of little moment because the courts below properly concluded that plaintiff failed to carry her burden of proof. She failed to present a *prima facie* case of discrimination under any reading of the test articulated by this Court in *McDonnell Douglas* v. *Green, supra*, at 802-803, n. 13.

No inference of discrimination arose in this case sufficient to shift the burden of producing evidence to the District because there was no vacancy for which plaintiff could be considered. The District Court so expressly found and the plaintiff offers no arguments to the contrary. Appendix B, at 16a-17a; 19a; 27a. An employer can hardly be accused of racial discrimination for refusing to hire (or allow a return to duty) when no vacancy exists. Plaintiff totally failed to produce any evidence that she was treated less well on the basis of her race than other teachers seeking leave rescissions, the touchstone of a disparate treatment case. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335-336, n. 15 (1977). The District in fact proved that no one received a leave rescission during this period of time, regardless of race or sex. Appendix B, at 27a-28a.

Plaintiff's most serious omission, however, is highlighted by the manner in which she poses the "Question Presented" in her Petition. It focuses exclusively on the question of a *prima facie* case. It ignores the bulk of the evidence introduced by the District demonstrating that it declined to rescind plaintiff's leave on strictly financial grounds. The District had teachers

coming out of its ears. It had no incentive to pay plaintiff for a year of substitute work (if that) when it could allow her to remain on unpaid leave. Since no other leaves were rescinded, this constitutes a legitimate nondiscriminatory reason for rejecting the plaintiff's request. *Id.*, at 28a.

Therefore, even if the plaintiff's evidence was sufficient to establish a *prima facie* case of discrimination, the courts below acted properly in finding against her on the remaining elements of a disparate treatment case. The plaintiff is still not entitled to relief even if the question presented herein were resolved in her favor. This is not the type of case for which review by writ of certiorari was intended.

CONCLUSION

The plaintiff is not entitled to yet one more review of a case already deemed meritless by two federal courts. Her Petition presents no novel issues, no errors of law and no reasons for further occupying the attention of this Court. The Petition For a Writ of Certoriari herein should be denied.

DATED: July 6, 1982

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City Attorney
STEVEN A. DIAZ
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Counsel of Record
PHILIP S. WARD
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By_____
STEVEN A. DIAZ
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San Francisco Unified School
District

CERTIFICATE OF SERVICE

I, STEVEN A. DIAZ, attorney for Respondent, hereby certify that on the 6th day of July, 1982, I caused copies of this Brief in Opposition to Petition For Writ of Certiorari to be served on all parties required to be served by depositing three copies in the United States Mail, first-class postage prepaid, in an envelope addressed to Bruce A. Fredrickson, Webster & Fredrickson, 1522 K Street, N. W., Suite 1030, Washington, D.C. 20005.

DATED: July 6, 1982

STEVEN A. DIAZ
Deputy City Attorney
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Office - Supreme Court, U.S.
FILED
AUG 31 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2216

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LAURA M. BYRD, PETITIONER

v.

SAN FRANCISCO UNIFIED SCHOOL DISTRICT,
RESPONDENT

REPLY TO DEFENDANT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO PETITION FOR WRIT

Defendant-respondent asserts in its Opposition to Plaintiff's Petition for Writ that "[p]laintiff does not contend that the courts below failed to apply the legal standard appropriate to a Title VII disparate treatment case" and that plaintiff "quarrels with the results...reached in applying that standard to the evidence." [Defendant's Opposition to Plaintiff's Petition for Writ, at 4.] Defendant has misconstrued the thrust of Plaintiff's Petition in that plaintiff asserts that the standard applied by the trial court was inappropriate because the trial court refused to acknowledge the inherent flexibility of the standard established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), a refusal which places the court in diametric opposition to the progression of Supreme Court Title VII

decisions. A strict form of the McDonnell Douglas standard, as applied to the instant case, is perhaps more appropriate to a single event, for instance a single failure to hire, but the manifestation of that standard in later cases such as Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), lends itself to more complex patterns of facts and events. In Burdine, the Court required that the plaintiff demonstrate an adverse employment decision "under circumstances which give rise to an inference of unlawful discrimination." Id., 450 U.S. at 253 (footnote omitted).

Further, plaintiff asserts that this strict application of McDonnell Douglas controlled the flow of evidence to the prejudice of plaintiff's claims, and thus necessarily gave rise to erroneous conclusions of fact and law. Specifically, plaintiff complains that the trial court

viewed plaintiff's attempt to establish a prima facie case only from the all too narrow perspective of the denial of the rescission of plaintiff's leave of absence. In viewing this single event as an isolated act, the trial court refused to consider the previous acts committed by the defendant against the plaintiff, which led to, and in fact preordained, the defendant's decision to deny her request for rescission. The essential error of the court is most easily demonstrated in the context of the issue of a vacancy, on which the court rested its conclusion that plaintiff failed to make a prima facie case (Plaintiff's Petition, Appendix B, at 26a), and on the issue of pretext, which the trial court also found plaintiff had failed to establish (Id., at 28a).

The Vacancy Argument

The trial court found and defendant contends that plaintiff failed to establish a prima facie case because "[n]o inference of discrimination arose in this case sufficient to shift the burden of producing evidence to the District because there was no vacancy for which plaintiff could be considered." [Opposition, at 5]. Under the unique facts of plaintiff's case, the acts and policies of the defendant itself prevented a vacancy from ever arising under traditionally recognized meanings of the term, and therefore any rigid, narrow application of the standard would allow any defendant to evade its duties under civil rights laws by a convenient prearrangement of the facts. Surely it is this very manipulation of facts and circumstances characteristic of the most invidious forms

of discrimination that the Supreme Court has determined to eradicate in two decades of landmark decisions.

More specifically, both the defendant and the trial court erroneously focused their attention solely on the defendant's refusal to rescind the plaintiff's leave of absence which was the culmination of a series of discriminatory actions. The trial court should have focused on the prior adverse actions, which made the defendant's refusal inevitable, as well as the ultimate decision on her request to rescind her leave. Before plaintiff's request for a leave of absence was acted upon by the Board of Education and while plaintiff was still a full time staff member, defendant removed her name from the fall schedule, disassembled plaintiff's sequence of assignments, and selected a white teacher with less seniority to cover the remaining needs of

the department. Thus, no vacancy, under the traditional meaning of the word, ever arose; defendant dissolved plaintiff's position around her.

Moreover, plaintiff's principal notified the staff administrator that he had written her out of the program and that there would not be a position for her at the school in the fall. In reply, the staff administrator made an absolute commitment to the principal that should the plaintiff apply for rescission she would be prevented from returning to the system, under any circumstances and regardless of the needs of the District. This commitment was made without notice to the Board empowered to make such decisions and without notice to the plaintiff that an adverse employment decision had been made.

In this wider context, the requirement that plaintiff demonstrate the presence of a vacancy is plainly irrele-

vant. Further, the trial court's companion finding, that plaintiff failed to demonstrate that "no one in the pool of consolidated teachers was qualified to fill the available teaching position" (Id., at 28a), must also be rejected as a misapprehension of the applicable standard to the facts as presented.

The Pretext Issue

The error of the trial court in misapplying the McDonnell Douglas standard solely to the discriminatory result rather than the prior adverse acts infects the remainder of the decision which addresses the pretext issue. As with the prima facie case, the trial court viewed the District's claim of a legitimate non-discriminatory reason for its acts only from the perspective of its refusal to rescind plaintiff's leave of absence. The appropriate frame of refer-

ence for weighing defendant's rationale includes the time of its initial adverse acts which occurred months earlier.

When this wider frame of reference is observed, defendant's vociferous protest that the District "declined to rescind plaintiff's leave on strictly financial grounds" [Opposition, at 5; emphasis added] acquires a distinctly hollow ring. As previously noted, plaintiff was a full time staff member at the time of defendant's prior adverse acts. In testimony defendant's witnesses admitted that salaries were in the tentative district budget prior to July and that the budget was not final until perhaps the second week of August [Tr. 280] and further that the absolute extent of the District's staffing needs remained unclear at least until August and possibly into September [Tr. 133]. Therefore, the acts directed particularly against the

plaintiff, a staff member with significant accumulated seniority and who was replaced by a white teacher with less seniority, take on an entirely different character. Whatever appeal to the unstudied eye defendant's rationale may have, a more broadly directed focus on the entire series of adverse acts reveals an attempt by the defendant to justify its acts in retrospect. Such post-hoc justification must be rejected. Nanty v. Barrows Co., 660 F.2d 1327 (9th Cir. 1981) (Defendant's attempt to explain why plaintiff would not have been hired rejected as an explanation for failure to hire).

Moreover, plaintiff's full offer of proof, rejected by the court, reflects precisely the type of evidence anticipated by the Supreme Court for proof of pretext. In McDonnell Douglas itself, the Court stated: "[o]ther evidence that may be relevant to any showing of pretext

includes facts as to the petitioner's treatment of respondent during his prior term of employment...and petitioner's general policy and practice with respect to minority employment." McDonnell Douglas v. Green, supra, 411 U.S. at 804-05. Plaintiff in the instant case sought to introduce before the court evidence of the racial animosity of her principal as well as the experiences of other minority faculty in similar circumstances. The trial court in some instances refused to admit the evidence, while in others it rejected the evidence out of hand. Thus, the trial court stands inapposite to the very principles forwarded by the Supreme Court, and has hamstrung the plaintiff only to accuse her of failing to offer sufficient evidence to make her rebuttal case.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Bruce A. Fredrickson